

Appl. No. : 09/821,371
Filed : March 29, 2001

COMMENTS

Status of Claims

Claims 1-16, 19-28, 30-40, 43-48 and 50-86 are presently pending in this reissue application. Claims 1-15 correspond to Claims 1-15 of U.S. Patent No. 5,890,128 for which reissue is sought and Claims 16- 19-28, 30-40, 43-48 and 50-86 were added in the reissue application and the previous Amendment. Claims 1-16, 19-28, 30-40, 43-48 and 50-86 stand rejected.

As required by C.F.R. §1.173, the changes to the claims are indicated, with respect to the original application upon which the reissue is based, by underlined text for additions and bracketed text for deletion. In this amendment, Applicant has amended Claims 6, 8, 16, 35, 36, and 86 .

1. Allowable Subject Matter

Applicants note with appreciate that the Examiner has indicated that Claims 1-16, 19-28, 30-40, 43-48 and 50-86 are allowable over the prior art.

2. Matters of Form

Applicant has amended Claims 6, 8 and 86 to correct the informalities noted by the Examiner. Applicant has also amended Clams 35 to correct an error. Specifically, Claim 35 now recites "a graphical format" instead of "a tabular format."

3. Recapture

Claims 16, 19-28, 30-40, 43-48, and 50-86 stand rejected as "as being an improper recapture of broadened claimed subject matter surrendered in the application for which the present reissue is based." Specifically, the Examiner stated that "[a]lthough claims 16, 19-28, 30-40, 43-48 recite the

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selection of either nutrition data or exercise data via menus, these claims do not limit this selection to using both nutrition and exercise menus as required by the above amendments to claims 1 & 15.”

As amended, Claim 16 recites, in part, “software stored in said memory, said software including a data retrieval portion and a display portion, said display portion and said data retrieval portion configured such that said user can select nutrition data for at least one of said various food items ; said display portion and said data retrieval portion also configured such that a user can select exercise data for at least one of said various exercise activities, said display portion and said data retrieval portion are configured such that said user can select said one of said various food items by navigating with said user interface and said display through a nutrition menu, said display portion and said data retrieval portion also configured such that said user can select said one of said various exercise activities by navigating with said user interface and said display through an exercise menu.” As such, Claim 16 claims both a nutrition menu and an exercise menu. Amended Claims 36 and 86 both include the limitations recited above.

Claim 40 recites, in part, “receiving a food item selection from said user for at least one food item by navigating with said user interface and said display through a nutrition menu” and “receiving an exercise data selection from said user for at least one exercise activity by navigating with said user interface and said display through an exercise menu.” Claim 55 includes the same limitations.

Applicant, therefore, respectfully submits the Claims 16, 36, 40, 55 and 86 do not recapture subject matter that was lost during the prosecution of U.S. Patent No. 5,890,128. With respect to Claims 19-28, 30-35, 37-39, 43-48, 50-54, and 56-85, these claims depend upon one of the

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independent claims above. As such, they include the limitations discussed above and therefore also do not improperly recapture subject matter.

3. The Reissue Oath/Declaration.

The Examiner has objected to the supplemental declaration because “the reissue oath/declaration fails to identify at least one error which is relied upon to support the reissue application. Applicants respectfully submit that the reissue oath/declaration filed and with this application and the supplemental declaration filed with the previous response are not defective for at least the reasons set forth in the previous Amendment.

In addition, in paragraph 6, the Examiner is apparently asking Applicants to identify every error corrected by this reissue application. However, Applicants “need only specify in the reissue oath/declaration one of the errors upon which reissue is based.” M.P.E.P 1414 (emphasis added).

The Examiner has also asked Applicants to identify in the declaration “how these amendments overcome an error” and “how these new claims overcome an error.” *See* paragraph 6. However, “[i]n identifying the error, it is sufficient that the reissue oath/declaration identify a single word, phrase, or expression in the specification or in an original claim, and how it renders the patent wholly or partly inoperative or invalid. The corresponding corrective action which has been taken to correct the original patent need not be identified in the oath/declaration. *Id.* (emphasis added).

Moreover, Applicant respectfully notes that it “is not necessary, to point out how (or when) the error arose or occurred. Furthermore, it is not necessary to point out how (or when) the error was discovered.” *Id.* (emphasis in original).

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Nevertheless, to advance prosecution and in view of changes in the claims made by this Amendment, Applicant is providing a Second Supplemental Declaration, which addresses some of the informalities noted by the Examiner. Specifically, Applicant has (i) added the paragraph suggested by the Examiner and (ii) removed references to canceled claims in paragraph 6.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the rejections set forth in the outstanding Office Action are inapplicable to the present claims and specification. Accordingly, early issuance of a Notice of Allowance is most earnestly solicited.

The undersigned has made a good faith effort to respond to all of the rejections in the case and to place the claims in condition for immediate allowance. Nevertheless, if any undeveloped issues remain or if any issues require clarification, the Examiner is respectfully requested to call Applicant's attorney in order to resolve such issue promptly.

Respectfully submitted,

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